

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court		District
Name (under which you were convicted): Daniel Jenkins		Docket or Case No.: 2:13-CN-00646
Place of Confinement: U.S.P. Big Sandy P.O. Box 2068 Inc2, KY		Prisoner No.: 64784-050
UNITED STATES OF AMERICA		Movant (include name under which you were convicted) Daniel Jenkins

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

United States District Court Newark NJ 07101-0999

(b) Criminal docket or case number (if you know): **2:13-CN-00646**

2. (a) Date of the judgment of conviction (if you know):

(b) Date of sentencing: **March 11, 2014**

3. Length of sentence: **188 months**

4. Nature of crime (all counts): **21 U.S.C. 841(a)(1) AND 841(b)(1)(B)**

5. (a) What was your plea? (Check one)

(1) Not guilty ☐

(2) Guilty ☒

(3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one)

Jury ☐

Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☒
8. Did you appeal from the judgment of conviction? Yes ☐ No ☒
9. If you did appeal, answer the following:
- (a) Name of court:
 - (b) Docket or case number (if you know):
 - (c) Result:
 - (d) Date of result (if you know):
 - (e) Citation to the case (if you know):
 - (f) Grounds raised:

- (g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒

If "Yes," answer the following:

- (1) Docket or case number (if you know):
- (2) Result:
- (3) Date of result (if you know):
- (4) Citation to the case (if you know):
- (5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ☐ No ☐

N/A

11. If your answer to Question 10 was "Yes," give the following information:

- (a) (1) Name of court:
- (2) Docket or case number (if you know):
- (3) Date of filing (if you know):

N/A

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐

(7) Result:

(8) Date of result (if you know):

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐

(7) Result:

(8) Date of result (if you know):

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

DID COUNSEL RENDER INEFFECTIVE ASSISTANCE OF COUNSEL
DURING PLEA NEGOTIATION

SEE: ACCOMPANY MOTION FOR SUPPORT OF CLAIM

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒ N/A

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒ N/A

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

DID COUNSEL RENDER INEFFECTIVE ASSISTANCE OF COUNSEL
DURING DIRECT APPEAL

SEE: Accompany motion for support of the claim

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND THREE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

N/A

(b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

N/A

(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

Issues Presented in this motion are based on ineffective assistance of counsel and affords relief primarily through this movement pursuant to 28 U.S.C. 2255

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing:

(b) At arraignment and plea: UNKNOWN

(c) At trial: MICHAEL V. GILBERT

(d) At sentencing: SAME

(e) On appeal:

N/A

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding:

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

N/A

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief:

AN EVIDENTIARY IS WARRANTED BY LAW

or any other relief to which movant may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct
and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on
(month, date, year).

Executed (signed) on 3-17-15 (date).

Daniel Jenkins

Signature of Movant

I declare (or certify, verify, or state) under penalty of perjury that I have been notified that I must include in this motion all the grounds for relief from the conviction or sentence that I challenge, and that I must state the facts that support each ground. I also understand that if I fail to set forth all the grounds in this motion, I may be barred from presenting additional grounds at a later date.

Executed (signed) on 3-17-15 (date)

Signature of Movant Daniel Jenkins

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

CLERK OF COURT
U.S. DISTRICT COURT
In the United States District Court
for the District of New Jersey

2015 FEB 24 07:11:10

DATE: *March 17, 2015*

United States of America

v.

Daniel Jenkins
CR.NO. 2:13-CR-00646-WHW-1

Petition Pursuant to 28 U.S.C. 2255

DATE: *3-17-15*

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Questions Presented

1) Did Counsel render ineffective assistance of counsel during plea negotiation?

2) Did Counsel render ineffective assistance of counsel during Direct Appeal?

Statement of Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. 2255.

Certificate of Interested Parties

United States District Court
for the District of New Jersey

United States Attorney's Office

Statement of the Case

Petitioner was indicted on allegations of violating United States penal code Section 841 (A) and 841 (b) (1) (b), through a one count indictment based on substance seized in this case, being, 10 grams or more of a mixture and substance containing phencyclidine, and a quantity of a mixture or substance which contained a particular amount of heroin. This case resulted in a conviction based on a Rule 11 plea agreement, which Petitioner initially waived certain rights to direct appeal and collateral. Petitioner was subsequently sentenced to 188 months of incarceration. A direct appeal was requested by Petitioner in this case based on Petitioner's counsel's ineffectiveness during the plea negotiation and most relevant a breach of agreement of stipulations advocated during the plea colloquy. During direct appeal juncture counsel was again ineffective, which the Court of Appeals directed counsel to show cause for his failed requirements to effectuate the direct appeal or he must appear before the Attorney-Hearing Officer. Counsel did not comply to the Court of Appeals instructions and Petitioner was directed to proceed pro se in filing a Motion in Opposition of the Government's Motion for Enforcement of Appellate Waiver, and Summary Affirmance. Petitioner's pro se motion was denied without an opinion, Petitioner filed for a rehearing which was denied on January 13, 2015.

Background

Petitioner is alleged to have conspired with John [redacted] Edwards and Claude Fields, and others, to Distribute and Possess with Intent to Distribute, PCP, and Heroin, in Hudson County, NJ., during a period of time between May 12th through September 12th of 2012. Allegedly Petitioner and Edwards, on or around the Date of, June 7, 2012, sold to another, approximately 50 individual glassine envelopes of heroin. Also, on June 7, 2012, 250 glassine envelopes of heroin were allegedly distributed. In furtherance its alleged that on, June 14, 2012, Edwards gave Petitioner approximately four small glass jars that contained PCP to sell to a third party. On that same day its alleged that Fields gave Petitioner 15 "Yam"; raw heroin, to sell to a third person. On, June 26, 2012, its alleged that Petitioner sold 550 individual glassine envelopes of heroin and three bottles of PCP. On, July 18, 2012, its alleged that Edwards gave Petitioner 700 individual glassine envelopes of heroin to sell. On, July 23, 2012, its alleged that Petitioner sold an unspecified amount of PCP. On, August 29, 2012, its alleged that Petitioner sold 1000 individual glassine envelopes of heroin, and on, September 10, 2012, its alleged the Petitioner sold 1400 individual glassine envelopes of heroin. The alleged quantity of heroin involves approximately 87.3 grams, and the alleged quantity of PCP is approxiamately 11.18 grams. Petitioner and his co-defendants entered into a plea agreement to the charged offenses. Petitioner and Edwards were represented by the same attorney which during

Petitioner's plea colloquy the Court held a hearing on the potential conflict of interest based on counsel's representation of, both, Petitioner and Edwards. Petitioner's attorney advised him that he can not represent both defendants if one or the other adduced any information against the other that could be used to mitigate their role or provide further inculpatory evidence as a benefit for sentencing purposes. But, that he could represent both if the Court was only sentencing both based on the allegations of the charging offenses. The Court further alleged the unlikelihood of a benefit for cooperation based on the simultaneous representation. Based on the agreement's stipulation Petitioner allowed the attorney to continue his representation. The Court did not advise Petitioner that if this particular agreement was breached that it would be void and Petitioner's rights to appeal the breach would be reinstated. Edwards through a separate hearing receive a benefit contrary to the stipulated agreement. Petitioner and Edwards were subjects for career offender enhancements, but Edwards received a 48 month sentence oppose to Petitioner's 188 month sentence based on counsel's representation of negotiations with the Government. During direct appeal counsel was ineffective established by court orders based on his Constitutional requirements of providing effective assistance during direct appeal.

Argument

Pursuant to 28 U.S.C. 2255 a prisoner in federal custody may seek to have his sentence vacated, set aside or corrected, if it was imposed in violation of the Constitution or laws of the United States or is otherwise subject to collateral attack. To succeed

on an ineffective assistance of counsel claim, a defendant must satisfy the two-part test set forth by the United States Supreme Court in, *Strickland v. Washington* 466 U.S. 668, 80 L.ED.2d. 674, 104 S.Ct. 2052 (1984); Also: SEE: *Carpenter v. Vaughn* 296 F.3d. 138, 149 (3d.Cir.2002). The first prong of the *Strickland* test requires a defendant to show that his counsel's errors were so egregious as to fall below an objective standard of reasonableness. In determining whether counsel's representation was objectively reasonable, the Court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; SEE: *McAleese v. Mazurkiewicz* 1 F.3d. 159, 166 (3d. Cir. 1993). Under the second prong of *Strickland*, the defendant must demonstrate that he is actually prejudiced by counsel's errors, meaning that there is a reasonable probability that, but for counsel's faulty performance, the outcome of the proceedings would have been different; SEE: *Frey v. Fulcomer* 974 F.2d. 348,358 (3d.Cir.1992); *Weeks v. Snyder* 219 f.3d.245, 257 (3d.Cir.2000). To establish prejudice, the defendant must also show that counsel's errors rendered the proceeding fundamentally unfair or unreliable; SEE: *Lockhart v. Fretwell* 506 U.S. 364, 369, 122 L.ED.2d. 180, 113 S.Ct. 838 (1993). The test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. Where a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases;

SEE: Hill v. Lockhart 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.ED.2d. 203 (1985); United States v. Booth 432 F.3d. 542, 547 (3d.Cir. 2005) (effectiveness of counsel applies to advice given by counsel during guilty plea discussions); United States v. Burnett 2014 U.S. Dist. LEXIS 4944 (3d.Cir.2014) (plea agreement waiver of postconviction rights does not waive the right to bring a 2255 petition based on ineffective assistance of counsel claims challenging the validity of the plea or the waiver); Haring v. Prosise 462 U.S. 306, 302, 103 S.Ct. 2368, 76 L.ED.2d. 595 (1983) (among claims not barred are those that challenge the validity of the guilty plea itself); Missouri v. Frye 132 S.Ct. 1399, 1405, 182 L.ED.2d.379 (2012) (the right to effective assistance of counsel extends to the plea negotiation process); United States v. Day 969 f.2d. 39, 43 (3d.Cir.1992) (in the context of a guilty plea, counsel must give a defendant information sufficient to make a reasonably informed decision whether to accept the plea offer). In Petitioner's case his conviction was the result of a Rule 11 plea agreement which Petitioner initially waived certain rights, relevant to this inquiry, direct appeal and collateral. During the plea colloquy a conflict of interest inquiry was held based on Petitioner's counsel's representation of, both, Petitioner and his co-defendant John Edwards. The court explained to Petitioner relevant potential conflict of interest that may arise, in pertinent part, that Petitioner would unlikely be able to receive a benefit of a reduced sentence based on cooperation if he decides to allow his counsel, Michael Gilberti, to continue representation of, both, he and Edwards. Petitioner's counsel also advised him that he can not represent both defendants if one or the other adduces any information

against the other that could be used to mitigate their role or provide further inculpatory evidence as a benefit for sentencing purposes. But, that he could represent both if the court was only sentencing both based on the allegations of the charged offenses. Petitioner's counsel led him to believe, as did the Court, that the same would apply to Edwards. Petitioner did not make any statements against Edwards or the allegations of the charged offense. Petitioner's counsel nor did the Court advise Petitioner that if this particular agreement was breached it would no longer be valid and his right to be conflict free would be subject to judicial review. The Court only advised Petitioner that if he agree to allow his counsel to continue representation of, both, he and Edwards that he (Petitioner) could not later raise a conflict of interest claim. Petitioner's counsel nor did the Court fully protect Petitioner rights to be conflict free by the omission of his right to appeal if the stipulation was breached. Counsel's ineffectiveness left Petitioner in a position of not being able to fully evaluate his options of pleading or the protections of his rights if the agreement was breached. Petitioner did not waive, relinquish, nor abandon his right to appeal the breach of the above stated stipulation, because it was not known to Petitioner that if this particular stipulation was breached that the stipulation would no longer be valid, and therefore, subject to judicial review; SEE: United States v. Olano 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.ED.2d.508 (1993) quoting: Johnson v. Zerbst 304 U.S. 458 (waiver is the intentional relinquishment or abandonment of a known right); Town of Newton v. Rumery 480 U.S. 386, 393, 107 S.Ct. 1187, 94 L.ED.2d.405 (1987);

Brady v. United States 397 U.S. 742, 752-53, 90 S.Ct. 1463, 25 L.ED.2d. 747 (1970) (criminal defendants may waive both constitutional and statutory rights, provided they do so voluntarily and with knowledge of the nature and consequences of the waiver); McCarthy v. United States 394 U.S. 459, 466, 22 L.ED.2d. 418, 89 S.Ct. 1166 (1969) (requires that a defendant understand the law in relation to the facts in order for a plea to be valid); United States v. Booth 432 F.3d. 542, 547 (3d.Cir.2005) (the test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant). Moreover, it has been longstanding that substance of oral agreements and stipulations are binding when recited on the record and accepted by a Federal District Judge ; SEE: Kokkonen v. Guardian Life INC. Co. 511 U.S. 375, 128 L.ED.2d.391, 114 S.Ct. 1673 (1994). Plea bargains are essentially contracts; SEE: Mabry v. Johnson 467 U.S. 504, 508, 104 S.Ct. 2543, 81 L.ED.2d. 437 (1984), and oral agreements are part of the contract; SEE: Uncon Processing COP. v. Atkin 465 U.S. 1038, 79 L.ED.2d. 712, 104 S.Ct. 1316 (1984). In Petitioner's case the Court explicitly instructed when referencing the unlikelihood of a benefit for cooperation based on the simultaneous representation of counsel that it also applied to Edwards. Petitioner's counsel was ineffective for not protecting Petitioner's rights to appeal if Edwards sentence was considered on any factors promised on cooperation, on any level, other than pleading to the charged offense in the order set forth in the indictment or information. The omission of the preserved right to appeal was critical and allowed

Edwards to mitigate his role in the charged offense without Petitioner having any protection against Edwards potential misleading or totally fabricated assertions through mitigation or cooperation. Edwards received a benefit during his negotiation and sentencing, therefore the oral stipulation of the written agreement was breached. The Courts have held that a charge of a breach of a written contract, that was subsequently modified by an oral agreement presents a purely legal question and goes to the question of just what, under the law, the contract between the Government and Petitioner is; SEE: Dairy Queen v. Wood 369 U.S. 469, 8 L.ED. 2d. 44, 82 S.Ct. 894 (1962). The Supreme Court in Puckett v. United States 556 U.S. ___, 129 S.Ct. ___, 173 L.ED.2d.266, 2009 U.S. LEXIS 2330 (2009), holds that, when consideration for a contract fails-that is when one of the exchanged promises is not kept-the Court does not say that the voluntary bilateral consent of the contract never existed, so that it is automatically and utterly void, the Court says that the contract was broken. Moreover, the issue during plea negotiation's first call of duty through the conflict of interest hearing was to determine whether a separate counsel should be appointed to Petitioner in order to protect his rights through due process and the Sixth Amendment. This Court has also held, where a defendant does not seek the reversal of his conviction (i.e., does not seek to withdraw his guilty plea) but only challenges the validity of his appellate waiver so that he may appeal his sentence, he is obligated to show a reasonable probability that the Rule 11 error has precluded him from understanding that he had a right to appeal and that he had substantially agreed

to give up that right. The reasonable probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but of error things would have been different; SEE: Hines v. Ricci, et al., respondents United States District for the District of New Jersey 2013 U.S. Dist. LEXIS 48852 (3d.Cir.2013), also SEE: Williams v. Taylor 529 U.S. 362, 397, 120 S.Ct. 1495, 146 L.ED.2d. 389 (2000) (holding that Virginia Supreme Court's adjudication of ineffective assistance of counsel claim was contrary to or an unreasonable application of Strickland's reasonable probability standard for prejudice where the Virginia Court ruled that mere difference in outcome is not sufficient to find prejudice); Megana v. Hofbauer 263 F.3d. 542, 550 (6th Cir. 2001) (holding that, by placing a burden of proof on the defendant which was more exacting than a reasonable probability to determine prejudice, Michigan Court of Appeals adjudication of ineffective assistance during plea negotiations claims was contrary to clearly established Supreme Court precedent); Rose v. Lee 252 F.3d. 676, 689 (4th Cir. 2001) (holding that it was contrary to clearly established Supreme Court precedent for state court to require Petitioner to prove prejudice under Strickland by preponderance of the evidence); Mask v. McGinnis 233 F.3d. 132, 140 (2d. Cir.2000) (concluding that state court's failure to employ reasonable probability standard to evaluate ineffective assistance during plea negotiations claim unreasonably applied clearly established Supreme Court precedent). In this case, had Petitioner known that he was waiving the right to appeal if Edwards was allowed any benefit contrary to what was advised by counsel and the court, to Petitioner,

in concern of this critical conflict of interest Petitioner would not have accepted the plea negotiated by his counsel nor allowed him to continue representation. Clearly, since the Court instructed Petitioner that it was unlikely that any benefit will be received because of the simultaneous representation, but that nobody, not the Court, Government, nor counsel, at that time can foresee the potential conflict of interest that may arise, the Court should have also advised of the potential breach and counsel should have protected Petitioner's right to appeal if Edwards was to change course and proffer against Petitioner. Consequently, Edwards received a benefit contrary to what Counsel advised Petitioner would occur through the plea negotiation, and the Government was allowed to enforce an appellate waiver against Petitioner.

~~Counsel was Ineffective through the Plea Negotiation~~
~~by not Factually Determining the Quantity of Drugs~~

Petitioner advised his counsel to conduct an independent evaluation on the quantity of the drugs allegedly seized via the investigation because the quantity alleged to be seized is overstated. Counsel could not effectively negotiate a proper plea bargain without first determining the correct quantity which, effects Petitioner's guidelines range. Even given Petitioner's alleged career offender status, Petitioner would have received a considerably shorter sentence had counsel conducted the independent evaluation and discovered that in fact the quantity was overstated by the Government; SEE: United States v. Gibbs, CRIM.No. 81-260, 1986 U.S. Dist. LEXIS 24768, 1986 WL 6309, at 3 (E.D.PA. 1986) (drug quantity is primarily relevant under the penalties section in 21 U.S.C. 841 (b))

under which the Court determines the proper sentence to apply after a defendant is convicted).; United States v. Kauffam 109 F.3d. 186 (3d.Cir.1997) (an attorney must investigate a case, when he was cause to do so, in order to provide minimally competent professional representation); United States v. Gray 878 F.2d. 702 (3d.Cir.1989) (ineffective for failure to investigate); Wiggins v. Smith 539 U.S. 510, 123 S.Ct. 2527, 2535, 156 L.ED.2d. 471 (2003) (failure to conduct factual investigation of clients case was objectively unreasonable); Strickland (must include an independent examination of the facts). Petitioner's counsel was ultimately required to render reasonably effective assistance given the totality of the circumstances. The circumstances of Petitioner's case was based on a plea where a sentencing factor would primarily be based upon drug quantity. Petitioner's counsel relied only on what the Government had alleged in drug weight in calculating what would ultimately result in his guideline range. Counsel's conduct was not reasonable given the circumstances and had reason to conduct the factual investigation to determine the correct weight to effectuate an effective plea negotiation. Petitioner plead guilty to possession of the charged substance and knew how much in weight he had before packaging. When Petitioner reviewed what the Government was alleging as quantity, Petitioner advised his counsel that either the Government had deliberately overstated the weight or circumvented the process of determining the weight by weighing the substances with what it was packaged in. Consequently, had counsel conducted the independent investigation to effectuate the effective plea negotiation, Petitioner's guideline range, being the factor of the

negotiation, would have been considerably lower than the estimated and sanctioned 188 to 235 months. Therefore, counsel was ineffective through the plea negotiation and Petitioner was prejudiced. Moreover, counsel advised Petitioner that it did not make a difference if he conduct the independent investigation because Petitioner was still considered a career offender and would be sentenced accordingly, and, therefore, should enter the plea and attempt mitigations at sentencing. This advise was not competent and a deprivation of what is required by the Sixth Amendment.

Ineffective Assistance of Appellate Counsel

Legal Grounds:

The right to effective assistance of counsel is not confined to trial, but also extends to the first appeal as of right; SEE: *Kimmelman v. Morrison* 477 U.S. 365, 106 S.Ct. 2574, 91 L.ED.2d. 305 (1986); *Smith v. Robbins* 528 U.S. 259, 286-89, 120 S.Ct. 746, 145 L.ED.2d. 756 (2000) (Strickland standards applies to ineffective assistance of appellate counsel as well as the assistance of trial counsel). Based on the foregoing facts and law, Petitioner affirmatively plea the denial of effective assistance of counsel on his direct appeal based on counsel's unprofessional failure in litigating his direct appeal. Petitioner affirmatively plea prejudice within the meaning of; *Strickland v. Washington* 466 U.S. 668, 104 S.Ct. 2052, 80 L.ED.2d. 674 (1984) also SEE its Progeny; *Wiggins v. Smith* 539 U.S. 510, 123 S.Ct. 2527, 156 L.ED. 2d. 471 (2003). The ineffectiveness prong requires defendant to show that counsel's actions were not supported by a reasonable strategy; SEE: *Massaro*

v. United States 538 U.S. 500, 123 S.Ct. 1694, 155 L.ED.2d. 714 (2003), in light of all circumstances; SEE: United States v. Day 969 F.2d. 39, 42 (3d. Cir. 1992). Regarding the prejudice requirement the Supreme Court held that a reasonable probability is a probability sufficient to undermine confidence in the outcome; Strickland. This standard requires less than a preponderance of the evidence; SEE: United States v. Cross 308 F.3d. 308, 315 (3d.Cir. 2002).

Ineffective Claim:

After sentencing Petitioner notified his counsel to file a Notice of Appeal and assumed that he had filed the necessary notice. Petitioner began attempts to correspond with his counsel in reference to the necessary procedures and issues. However, counsel would not respond to any Petitioner's attempt communications. Petitioner then notified the Court of Appeals concerning counsel's neglect, which the Court forwarded Petitioner there docket sheet that indicated that counsel had not filed a timely Notice of Appeal; SEE: United States v. Shedrick 493 F.3d. 292 (3d.Cir.2007); United States v. Edwards 297 F. Supp.2d.813 (E.D. PA.2003) (counsel ineffective for failure to file the appeal). At this time it still appear that no Notice of Appeal had been filed by counsel but after Petitioner's continuous efforts, on, August 10, 2014, the Court of Appeals sent Petitioner a copy of there notification that it is waiting for the remaining case opening form to be filed, and an order to counsel to show cause as to why he has failed to file required transcript purchase order forms, and that he has until,

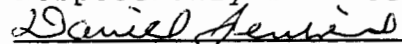
August 8th, to respond to the order or he must appear before the Attorney-Hearing officer. It further appear that at some time unknown to Petitioner the Government filed a motion for, Enforcement of Appellate Waiver, and Summary Affirmance. Counsel still had not effectuated the necessary procedures. The Court's have held that even after a waiver, a lawyer who believes a requested appeal would be frivolous is bound to file a Notice of Appeal and submit a brief pursuant to *Anders v. California*. When counsel fails to do so, the Court will presume prejudice, as required by, *Roe v. Flores-Ortega* 528 U.S. 470, 484, 145 L.ED.2d.985, 120 S.Ct. 1029 (2000), and the defendant will be entitled to a direct appeal without any showing on collateral review that his appeal will likely have merit; SEE: *Campusano v. United States* 442 F.3d.770 (2nd. Cir.(2005), *Anders* specifically requires that counsel submit a brief to the court and to the defendant, requesting withdrawal, but referring to anything in the record that might arguably support the appeal. The court--not-- counsel--then proceeds, after a full examination of all proceedings, to decide whether the case is wholly frivolous. In making this determination, the appellate court evaluates (1) whether counsel adequately fulfilled the rule's requirements (2) whether an independent review of the record present any nonfrivolous issues; SEE: *United States v. Watkins* 297 FED.APPX 170 (3d.Cir.2008). When counsel's Constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal; SEE: *Roe v. Flores-Ortega*. In this case, Petitioner's counsel has not

met any of the structured requirements, and, moreover, abandoned Petitioner's case at a critical stage. When it was apparent to the Court of Appeals that counsel had abandoned the case, the Court then instructed Petitioner to file a pro se brief in opposition of the Government's Motion for Enforcement of Appellate Waiver, and Summary Affirmance, and that the motion will be presented to the panel accompany by Petitioner's Motion to Appoint New Counsel. Based on counsel's defiance of the court order and abandonment of Petitioner's case and right to assistance of counsel on first direct appeal, causing a deprivation of Petitioner's Sixth Amendment right to counsel, in essence, Petitioner was denied counsel at a critical stage against his will; SEE: United States v. Cronin 466 U.S. 648, 659 N.25, 104 S.Ct. 2039, 80 L.ED.2d. 657 (1984) (counsel entirely fails to subject the prosecutions case to any meaningful adversarial testing; as well, the Court also explained that reversal is required where there has been a complete denial of counsel at a critical stage of the criminal proceeding); Evitts v. Lucey 469 U.S. 387, 83 L.ED.2d. 821, 105 S.Ct. 830 (1984) (due process clause guarantees a criminal defendant the effective assistance of counsel on a first appeal as of right, nominal representation on such an appeal does not suffice to render the proceeding Constitutionally adequate). Counsel's deficient conduct deprived Petitioner and the Court of Appeals there warranted evaluation of the District Court's errors during the Rule 11 colloquy which is the available juncture to adjudicate the District Court's errors; Also SEE: Exhibit (1) appeals court notifications to counsel in reference to his deficient requirements).

Conclusion

An Evidentiary Hearing is necessary and would be useful to this Court; SEE: Virgin Islands v. Weatherwax 20 f.3d. 572-73 (3d.Cir.1994) (Petitioner entitled to evidentiary hearing on ineffective assistance of counsel claim where facts viewed in light most favorable to Petitioner would entitle him to relief). In assessing whether counsel performed deficiently the Court must reconstruct the circumstances of counsel's challenged conduct and evaluate the conduct from counsel's perspective at the time; SEE: Harrington v. Richter 562 U.S. 86, 131 S.Ct. 770, 779, 178 L.ED.2d. 624 (2011). In this case the Court of Appeals has already confirmed counsel's deficient performance during direct appeal that warrants an evidentiary hearing, and the records of this case can establish counsel's deficient performance during the District Court's proceeding that supports Petitioner's claims, therefore, an evidentiary hearing is warranted in this case.

DATE: 3-17-15

Respectfully submitted,

Daniel Jenkins

CERTIFICATE OF SERVICE

I, Daniel Jenkins, do hereby certify under the penalty of perjury, 28 U.S.C. §1746 that I have served a true and correct copy of the following documents to be mailed to the following person, or parties, listed below which pursuant to Houston v. Lack, 487 U.S. 266 (1988), is deemed filed at the time it was delivered to prison authorities for forwarding to the Court, and service upon persons, or parties to this litigation, and/or their Attorney of record.

I have placed the documents referenced above in a properly sealed envelope with First-Class Postage affixed, and I addressed it to:

THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY
Room 11
Prison

I have also deposited said envelope via hand delivery to the Mail Room staff at the:

U.S.P. BIG SANDY P.O. BOX 2068 on this 3-17 day of
INEZ, KY 41224, 2015.

Respectfully Submitted,

Daniel Jenkins